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No. 392

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE;
EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE;
VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE;
LEO R. MARLATT AND LEWIS C. MARLATT,
PETITIONERS,

*vs.*

THE CITY OF WICHITA, KANSAS,
A MUNICIPAL CORPORATION,
RESPONDENT.

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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## INDEX.


| | Page |
|---|---|
| Statute and Constitutional Provisions Involved..... | 1 |
| Statement ..... | 2 |
| Argument: | |
| 1. Power of City to Condemn..... | 6 |
| 2. Respondent's Election to Condemnation Statute is Binding..... | 9 |
| 3. Notice by Chance is not Due Process..... | 10 |
| 4. The Power and Authority of Respondent is Challenged Generally..... | 11 |
| 5. Respondent's Proposed Use is not Disclosed... | 11 |
| Conclusion ..... | 13 |
| Appendix I..... | 14-15 |

## CASES CITED.


Page

Cincinnati v. Vester, 281 U.S. 439, 74 L. Ed. 950, 50 S. Ct. 360 ..... 12

Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L. Ed. 1027 ..... 10

Enterprise v. Smith, 62 Kan. 815, 62 Pac. 324 ..... 7,9

Reisner v. Strong, 24 Kan. 410 (Dassler's Ed.) 24 Kan. 297 ..... 11

State v. Boicourt Hunting Assn., 177 Kan. 637, 282 Pac. 2d 395 ..... 11

State v. Sholl, 58 Kan. 507, 49 Pac. 668 ..... 7


## STATUTES CITED.


Article 2, Section 16, Constitution of the State of Kansas ..... 2,6

G. S. of Kansas 1949, 13-1209 ..... 1,6

G. S. of Kansas 1949, 26-101 ..... 5,9

G. S. of Kansas 1949, 26-202 ..... 5,9

G. S. of Kansas 1949, 26-208 ..... 5

Session Laws of 1911, Chapter 87 ..... 6,7

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### STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

In view of Respondent's assertion of and reliance upon General Statutes of Kansas, 1949, 13-1209, enacted as Chapter 87, Kansas Session Laws of 1911, as its authority to condemn the lands sought to be con-

demned (Respondent's Brief, p. 1, 2 and 9), Petitioners respectfully submit that the title of said act becomes material in view of Section 16, Article 2 of the Kansas Constitution. Both of which are printed in Appendix I, *infra*, pp. 14-15.

## STATEMENT.

Petitioners respectfully call the Court's attention to the procedure followed in the lower courts and the basis upon which this case is presented to this Court.

Respondent at no time filed a responsive pleading to Petitioners' Complaint; Respondent's only formal pleading was its Motion to Dismiss, (D. C. Rec. 15), filed pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, which Motion was, upon presentation, enlarged to a Motion for Summary Judgment.

On the argument, Petitioners and Respondent each introduced certain exhibits, including Defendant's Exhibit "G", being proceeding in Sedgwick County District Court, Case No. A-45682. (D. C. Rec. 131) Whereupon, Petitioners offered Petitioners' Exhibit "1", being copies of certain papers filed in the Sedgwick County District Court, Case No. A-45682, which were not included in Defendant's Exhibit "G". (D. C. Rec. 158-170) Whereupon, the parties agreed that no material issue of fact survived the pleadings and the record evidence, and that the case was ripe for summary judgment. (D. C. Rec. 227) However, it must be remembered that the Respondent *never denied any* of the allegations of the complaint.

In view of the record, Petitioners respectfully submit that Respondent cannot now be heard to controvert any of the allegations of the complaint, nor to deny the correctness or materiality of any of the exhibits, as attempted in its brief. (Respondent's Brief, pp. 3, 4, 5)

Sedgwick County District Court Case No. A-45682 (Def. Ex. G; D. C. Rec. 131; Pl. Ex. 1; D. C. Rec. 158) *is material* and was *so considered* by both the District Court and the Court of Appeals; Respondent having offered such exhibit may not be heard now to contend that it is "wholly irrelevant and immaterial". (Respondent's Brief p. 3)

Furthermore, Respondent's assertion: "that the prior condemnation action covered lands other than those here involved" (Respondent's Brief, p. 3), is misleading, if not in fact untrue. The right-of-way purportedly condemned in the here-challenged proceedings, affects substantially all of the lands that were to have been affected by the prior condemnation case. (See and compare Def. Ex. G; D. C. Rec. 135, 136 with Def. Ex. B; D. C. Rec. 24-32, with particular reference to tracts 6, 11, 38, 40, 42.) Obviously the second condemnation case affected Petitioners' *lands* for the same purpose attempted in the first case, with *only a minor change* in the precise location of the *right-of-way*.

Comparison of all the property sought to be condemned in each proceeding shows that the second proceeding affected or covered, with the omission of a few tracts of land, substantially all of the identical lands affected, or sought to be affected by the first condemna-

tion proceeding with, however, *only a minor change* in the exact location *upon such lands* of the proposed *right-of-way.*

The Respondent's statement: "That the dismissal of the prior proceedings was entered only *because* and *when* the error in the land descriptions was discovered" (Respondent's Brief, p. 3) (Emphasis supplied), is not correct.

The prior proceedings were *not dismissed* until two days *after* the second condemnation proceedings were *completed.* Such conduct speaks much louder than Respondent's words.

There was no error in the *land descriptions* in the first proceeding but, at most, only a possible error as to the precise location of the *right-of-way* sought to be obtained, which could have been readily amended in the original proceedings if they were, in fact, the result of an error.

Respondent is in no position, and may not now attempt, to controvert the Petitioners' statements concerning the circulation and distribution of the newspaper in which the notice was published. (Respondent's Brief, p. 4)

In the first place the affidavit of publication (D. C. Rec. 51) shows on its face not only that the publication notice was published *only* in the "evening issue" of said The Wichita Eagle but also it does not purport to assert that such notice was ever published in the morning issue of said newspaper.

In the second place the affidavit of publication does not purport to say that the "evening issue" is of general circulation in Sedgwick County and the Audit Report of the Wichita Eagle (C. A. Rec. p. 23) conclusively shows that the "evening issue" is not, and was not, of general circulation in Sedgwick County. (See also Petition for Writ of Certiorari, p. 3)

Respondent's assertion: "following its adoption, the ordinance was published in a daily newspaper of general circulation in Sedgwick County, Kansas, on September 8, 1954" (Respondent's Brief, p. 5), is likewise not correct for the reasons above stated.

Petitioners respectfully direct the Court's attention to the fact that even the Respondent has admitted that the Sedgwick County District Court ordered the commissioners to give notice in "the official paper of the City of Wichita" (Respondent's brief, p. 5), which clearly demonstrates that both the Court and the Respondent relied upon and followed the procedure required by General Statutes of Kansas 26-202; without reference to either G. S. 1949, 26-208, or G. S. 1949, 26-101.

The Respondent further recognizes that the commissioners in condemnation met, pursuant to the published notice, in the City Commission room in Wichita, Kansas, and there made their award for the value of the lands taken and the damages resulting from such appropriation (Respondent's Brief, p. 6) and not on, or even near, the lands sought to be condemned, as required by the Order of the Court and the Laws of Kan-

sas. (See Petition for Writ of Certiorari, pp. 26, 27)

Respondent's statement, with respect to the franchise ordinance and the privileges and obligations of the Water Company therein contained, as follows: "The latter thereby obligates itself to distribute the water to the city and its inhabitants for domestic . . . ", (Respondent's Brief, p. 7), is only partly correct. The Franchise ordinance includes not only distribution to the city and its inhabitants, but also "to said city and *vicinity* and *environs* and the inhabitants thereof for domestic . . . " (Def. Ex. E; D. C. Rec. 202; Respondent's Brief, Appendix A1) "Vicinity" and "environs" has been interpreted by the City to justify the Wichita Water Company selling water to the city of El Dorado which is more than 35 miles from the City of Wichita.

## ARGUMENT.

### 1. POWER OF CITY TO CONDEMN.

Respondent, for the first time, has now disclosed the exact statute upon which it bases its supposed power, authority and right to condemn. It is General Statutes of Kansas 1949, 13-1209 (Respondent's Brief, pp. 1, 2, 9), enacted by the Kansas Legislature as Chapter 87 of the Session Laws of 1911. (Appendix I, *infra*, p. 14)

Therefore, it becomes necessary to examine the title to such act in the light of Article 2, Section 16 of the Kansas Constitution, (Appendix I, *infra* p. 15), the material part of which is as follows:

> "No bill shall contain more than one subject which shall be clearly expressed in its title . . . "

The Supreme Court of Kansas has repeatedly held the above provisions of the Constitution to be mandatory.

In the case of *State v. Sholl*, 58 Kan. 507, 49 Pac. 668, the Court, on page 511 of the opinion, said:

> "That the provisions of section 16 of article 2 of the Constitution are mandatory, and that the courts will declare void an act passed in violation of them, is firmly fixed in the jurisprudence of this State." (Citing a number of Kansas decisions.)

The title to the act, Chapter 87, Laws of 1911, (Appendix I, *infra* p. 14) relied upon by the Respondent, is as follows:

> "An Act authorizing cities of the first class to purchase, construct or extend waterworks, and to maintain, operate, regulate and protect the same."

Nowhere in the title is anything said or implied with respect to granting or conferring the power of Eminent Domain.

The Supreme Court of Kansas, in the case of *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324, held that a similar title to another act relating to water-works in cities of the third class which was also claimed to grant power of Eminent Domain, was invalid. On page 817 of the opinion the Court said:

> "Eliminating all of this title which does not pertain to the acquisition of water-works property, it reads as follows:
>
> 'An act authorizing and empowering cities . . . to obtain . . . water . . . by purchasing or constructing, owning and operating water-works.'

> It is seen, therefore, that the title of the act does not express the subject of condemnation as a means of acquiring water-works property, but expresses only the subject of its acquisition by purchase. Is the word 'purchase', or its participle, 'purchasing', used in the title, comprehensive enough to include condemnation? We think not."

and on page 820 of the opinion, also said:

> "It must be borne in mind that section 12 of the statute under consideration attempts to exert the sovereign power of dispossessing the citizen of his property. All the authorities hold that such statutes are to be strictly construed. No effect by implication or intendment other than that which is reasonable and necessary is allowed to them. For like reasons the same must be said of the titles to such enactments. Nothing should be regarded as comprehended within their titles except that which can with reasonably clear distinctness of view be seen. We are, therefore, constrained to hold that the title to the act in question does not embrace the subject of condemnation of property for water-works purposes. We regretfully come to this conclusion, because the statute is of much interest and is beneficial in its object; but it is better that its defects be pointed out at this early date after its enactment, so that the legislature may have like early opportunity to correct them."

The applicability of the above case to the pending case is clearly apparent and is controlling. Therefore, the Respondent does not have, and never has had, any valid power or authority to condemn any part of the lands sought to be condemned by either of the proceedings.

**2. RESPONDENT'S ELECTION OF CONDEMNATION STATUTE IS BINDING.**

In its opinion, the Court of Appeals recognized that the Respondent and the State Court proceeded under G. S. 1949, 26-202. However, in view of the Kansas rule as announced in syllabus 2 of *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324, as follows:

> "A plaintiff who elects to pursue one of two statutory remedies, which differ from each other in certain forms of procedure, and who avers in his petition that he has elected the remedy of such particular statute, and who, upon the hearing of his claims under it, is defeated because of its constitutional invalidity, cannot, upon error to this court, elect to treat his petition as filed under the other statute."

the following assertion by the Court of Appeals: "The fact that the parties thought they were giving the notice pursuant to Sec. 26-202, is immaterial" (Opinion pp. 50 and 51 of Petition for Writ of Certiorari), cannot be sustained.

Respondent having elected to proceed under G. S. 1949, 26-202, and the State Court having directed notice to be published in accordance with such statute, (D. C. Rec. 46), the Respondent may not now attempt to "change horses", nor may this, or any other, Court adopt any other statute for the Respondent.

Respondent recognized the situation when it stated that G. S. 1949, 26-101, "*is not here material*" (Respondent's Brief, p. 9) and further recognized that G. S. 1949, 26-202, was not adequate under the circumstances of this case:

> "It can be fairly assumed that the Legislature contemplated that in condemnations outside city limits, the provision of Section 26-202 for publication of the notice in the official city paper might not be applicable; that in such instances, in keeping with the fundamental requirement that notice must be reasonably adapted to the nature of the proceedings, publication should be made in a paper of general circulation in the area or county where the appropriated lands are located." (Respondent's Brief, p. 10)

The statute being inadequate, the proceedings are invalid.

**3. NOTICE BY CHANCE IS NOT DUE PROCESS.**

Respondent argues because Petitioners *just happened* to learn of the condemnation, that they were accorded "due process". (Respondent's Brief, p. 12)

This Court in the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, said:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Furthermore, Petitioners are challenging the *validity* of the condemnation proceedings, which under Kansas law can *only be done* in a separate suit. *State v. Boicourt Hunting Assn.*, 177 Kan. 637, 282 Pac. 2d 395. Petitioners could not appeal from the award and also challenge validity of the proceedings but had to elect which remedy to pursue. *Reisner v. Strong*, 24 Kan. 410 (Dassler's Ed., 24 Kan. 297).

**4. THE POWER AND AUTHORITY OF RESPONDENT IS CHALLENGED GENERALLY.**

Respondent seeks to limit the questions presented by asserting that the only aspect of its authority that is material, is the franchise arrangement with the Water Company in relation to the public character of the purpose of condemnation.

Question 5 presents that question (Petition for Certiorari, p. 4) but Question 6 directly challenges the authority of the Respondent to condemn irrespective of the question of public purpose. (Petition for Certiorari, pp. 4, 5, 22-25)

**5. RESPONDENT'S PROPOSED USE IS NOT DISCLOSED.**

There is no discernible limit on the purpose or use to which Respondent may put the land sought to be condemned. The stated purpose:

> "for the purpose of laying, installing, maintaining and operating pipes . . . *and other appurtenances* . . . for the construction, extension and improvement of the *water supply* and *water works system* . . . *for the purpose of supplying* said city and its environs and inhabitants thereof *with water*"

is wholly and completely without any limitation whatsoever, the Respondent would be free to make almost any installation or use under the guise of "an appurtenance to extend or improve its water supply or water works system". *Cincinnati v. Vester*, 281 U. S. 439, 74 L. Ed. 950, 50 S. Ct. 360, is the complete and controlling answer to such a situation. (Petition for Certiorari, pp. 17-19)

Petitioners insist upon their *right* to inquire and *be fully informed* as to just what are "the surrounding circumstances" referred to by Respondent in the statement:

> "It is submitted that such description *with the surrounding circumstances* leaves no uncertainty as to the nature of the intended use". (Respondent's Brief, p. 13) (Emphasis supplied.)

None of such "surrounding circumstances" were set forth in the Petition to condemn, filed in the State Court (D. C. Rec. 20), although Petitioners have consistently attempted to obtain information as to Respondent's true purpose. (D. C. Rec. 141)

Due process requires Respondent to fully disclose all the purposes and uses intended and also "the surrounding circumstances".

## CONCLUSION.

Petitioners respectfully submit that this Court should grant the requested Writ of Certiorari and summarily reverse the lower Courts.

Respectfully submitted,

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## APPENDIX I.

**STATUTE:**

**Laws of Kansas, Session Laws of 1911, p. 144, Chapter 87.**

**An Act authorizing cities of the first class to purchase, construct or extend waterworks, and to maintain, operate, regulate and protect the same.**

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That any city of the first class in the State of Kansas shall have full power and authority to purchase, construct or extend waterworks for the purpose of supplying such city and its inhabitants with water, and may maintain, operate and regulate the same, and prescribe the rates at which water shall be furnished; and any such city may acquire by purchase or appropriate proceedings in condemnation, all grounds deemed necessary either within or without the city upon which to erect such works, and upon which to lay pipes and mains for the purpose of conveying water to consumers; and for the purpose of protecting, maintaining and operating such works, any such city shall have the same jurisdiction over any grounds acquired outside the city for such purposes, as if such grounds were within the city.

SEC. 2. Any such city shall have the power and authority to issue bonds under the provisions of chapter 101 of the Laws of Kansas of 1905, and the bonds so issued or the proceeds derived from the sale of the same, or such part thereof as may be necessary, may be used by such city for the purpose of acquiring said grounds and for the purpose of purchasing, constructing or extending such waterworks.

SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

Approved March 13, 1911.

Published in official state paper March 25, 1911.

**CONSTITUTION:**

**Constitution of Kansas, Article 2, Section 16.**

**Subject and title of bills; amendment of laws.**

No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed.